

BEFORE THE
POSTAL REGULATORY COMMISSION

Statutory Review of the System for	:	
Regulating Rates and Classes for Market-	:	Docket No. RM2017-3
Dominant Products	:	

REPLY COMMENTS OF UNITED PARCEL SERVICE, INC.
(March 30, 2018)

United Parcel Service, Inc. ("UPS") respectfully submits these reply comments in response to the Commission's Notice of Proposed Rulemaking in this docket (the "NPR") concerning the statutory review of the market-dominant rate system established under the Postal Accountability and Enhancement Act ("PAEA").¹

INTRODUCTION

On March 1, 2018, the Postal Service filed initial comments in response to Order No. 4258, re-introducing a radical proposal to exclude Inbound Letter Post² from the Commission's proposed price cap on market-dominant products.³ If the Postal Service proposal is adopted, however, Inbound Letter Post will be neither a competitive product

¹ See Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market-dominant Products, Dkt. No. RM2017-3 (December 1, 2017) ("Order No. 4258").

² "Inbound Letter Post" consists "of inbound International pieces (originating outside of the United States and destined for delivery inside of the United States) that are subject to the provisions of the Universal Postal Convention of the Universal Postal Union and encompasses letters, packages, postcards, printed matter, and small packets, up to 2 kilograms. Letter Post items in transit through the United States from a foreign origin for delivery to a foreign destination are included in the Inbound Letter Post Grouping." See Postal Regulatory Commission, Mail Classification Schedule (Jan. 22, 2017).

³ See Comments of the United States Postal Service, Dkt. No. RM2017-3 (Mar. 1, 2018) ("Postal Service Comments"), at 153 (Inbound Letter Post includes parcels up to 4.4 lbs, including parcels coming into the U.S. with terminal dues rates).

nor a market-dominant product—it would be cast into its own product category, free of the rate cap and transparency requirements for market-dominant products and also free of the various restrictions on competitive products. As the Commission has previously recognized, this would violate PAEA.⁴ If any reclassification is necessary, it is to move Inbound Letter Post from the market-dominant category to the competitive category—as the Postal Service has already admitted small packets within Inbound Letter Post are “subject to considerable competition.”⁵

Moreover, the Postal Service has requested that Inbound Letter Post be excluded from the rate-cap regulations before, and the Commission properly denied that request. In Docket RM2007-1, the Postal Service made the same proposal and offered the same justifications for it.⁶ The Commission rejected the Postal Service's proposal then, and, for the same reasons, the Commission should reject the Postal Service proposal now.⁷

Finally, the Postal Service's proposal would undermine the efficiency goals of the market-dominant rate system by allowing the Postal Service to raise rates on domestic First-Class Mail without the safeguards provided by the rate cap. See 39 CFR § 3010.20-30. By removing Inbound Letter Post from the rate cap, the Postal Service will have

⁴ Order Establishing Ratemaking Regulations for Market-dominant and Competitive Products, Dkt. No. RM2007-1 (October 29, 2007) (“Order No. 43”), at 76 (“Unambiguously, the PAEA requires international mail to be classified as either market-dominant or competitive”).

⁵ See Determination to Unseal the Postal Service's Response to Chairman's Information Request No. 15, Dkt. No. ACR2017 (March 28, 2018) (“Order No. 4451”), at 23-24 (describing how the Postal Service “repeatedly claims that, notwithstanding its classification as a market-dominant product, the Inbound Letter Post product, specifically small packets, is subject to considerable competition”).

⁶ See Order No. 43 at 76.

⁷ See *Id.*

additional rate authority over captive First-Class Mail users. This concern is amplified given recent inquiries into the terminal dues system, which, if successful, would likely force the Postal Service to increase inbound rates on small packages to comply with the non-discrimination provision of PAEA. See, e.g., 39 U.S.C. § 403(c). If such price increases went into effect, the Postal Service would be limited in its ability to raise rates on captive First-Class Mail users because there would be less cap space available. See 39 U.S.C. § 3622(d).

For these reasons, the Postal Service's proposal should be rejected.

ARGUMENT

I. THE COMMISSION HAS PREVIOUSLY CONSIDERED THE PROPOSAL AND REJECTED IT

The Commission first implemented its ratemaking regulations for market-dominant products in 2007.⁸ As part of that docket, the Commission considered the make-up of products that would be subject to the market-dominant rate regulations,⁹ and as part of its analysis, the Commission considered the Postal Service's request that "inbound international mail not be classified as either market-dominant or competitive, but rather should be treated on an exceptional basis."¹⁰

The Postal Service advocated for that treatment because Inbound Letter Post rates "are set by the Universal Postal Union (UPU) Congress, and that for inbound Parcel Post, inward land rates are set pursuant to a prescribed rate-setting formula

⁸ See Order No. 43.

⁹ *Id.* at 73-89.

¹⁰ *Id.* at 76.

adopted by the Postal Operations Council (POC).”¹¹ The Postal Service also asserted 39 U.S.C. § 407 established a “separate scheme for transparency and oversight of inbound international mail charges.”¹²

The Commission rejected the Postal Service proposal. It reasoned as follows:

Had Congress intended to exempt inbound international mail from the requirement that all products be categorized as either market-dominant or competitive, it would have done so explicitly, as it did by specifically exempting experimental products from the requirements of section 3642.33. Unambiguously, the PAEA requires international mail to be classified as either market-dominant or competitive.¹³

Ultimately, the Commission rejected the proposal because the “rationales offered by the Postal Service” were not “persuasive.”¹⁴ For the same reasons that the Commission rejected the Postal Service’s proposal in 2007, it should do so again here.¹⁵

The Postal Service tries to distinguish the Commission’s earlier analysis by arguing the intervening “years of price-adjustment cases” have shown that inclusion of Inbound Letter Post within the price cap “has no effect on actual Inbound Letter Post rates.”¹⁶ But whether or not the price cap has affected Inbound Letter Post rates is

¹¹ *Id.* at 76-77.

¹² *Id.*

¹³ *Id.* at 76. The Commission has reiterated its position that these arguments were “unpersuasive” in a recent docket. See Order No. 4451 at 5-6.

¹⁴ Order No. 43 at 79.

¹⁵ The Postal Service correctly points out that the Commission had earlier decided the issue may be “revisited.” Postal Service Comments at 153. The Postal Service goes too far, however, in implying the Commission may revisit the decision that PAEA requires classification of products as either market-dominant or competitive. Order No. 43 at 76. The Commission was unambiguous on this point, and only conveyed it would potentially re-classify Inbound Letter Post as competitive if circumstances merited that outcome. *Id.* at 89 n.49.

¹⁶ Postal Service Comments at 154.

irrelevant to the rationale underpinning the Commission’s prior analysis—that the PAEA “requires international mail to be classified as either market-dominant or competitive.”¹⁷ Moreover, the Postal Service made this very same argument in the 2007 proceeding, and the Commission rejected it.¹⁸ The Postal Service’s second bite at this apple merits no additional analysis.

II. THE PROPOSAL WOULD CONTRADICT THE OBJECTIVES OF THE MARKET-DOMINANT RATE SYSTEM

One of the objectives of the market-dominant rate system is to “maximize incentives to reduce costs and increase efficiency.” 39 U.S.C. § 3622(b)(1). Inherent in this objective is the recognition that unconstrained upward adjustments in rates may reduce incentives for efficiency and cost reduction. This is why, among other reasons, the Commission introduced a “performance-based mechanism to encourage the Postal Service to maximize the incentives to increase operational efficiency”¹⁹ and declined to give the Postal Service unfettered authority to raise market-dominant rates.

Currently, the rate cap restricts the Postal Service’s ability to raise rates on First-Class Mail, of which Inbound Letter Post is a part.^[1] If the Commission were to exclude Inbound Letter Post from the rate cap, however, the Postal Service would be allowed to

¹⁷ Order No. 43 at 79.

¹⁸ *Id.* at 79 (“None of the rationales offered by the Postal Service in support of its request that inbound international mail be accorded exceptional treatment, e.g., **that prices for inbound services are largely beyond its control** or that section 407 establishes a different system of regulation for inbound mail, is persuasive”) (emphasis added).

¹⁹ Order No. 4258 at 61.

^[1] Order No. 43 at 88-89 (“Consequently, for purposes of applying the price cap, the Commission concludes that it is appropriate to list single-piece international mail as a product within First-Class Mail”).

use its entire rate-increase authority on domestic First-Class Mail, free of the need to consider the implications of rate increases on foreign First-Class Mail.

These concerns are amplified given that various postal stakeholders are questioning the validity of the terminal dues system. The Chamber of Commerce has stated it is “increasingly concerned that U.S. merchants and manufacturers are placed at an economic disadvantage to foreign merchants and manufacturers due to artificially low rates paid by foreign shippers.”²⁰ Members of Congress have sent a letter to the Postmaster General and the Secretary of State citing the “distortive and anticompetitive consequences of the UPU terminal dues rates.”²¹ The Commission itself has described a procedure under which a party can legally challenge the terminal dues system at the Commission.²²

If the legality of the terminal dues system were successfully challenged, the Postal Service would most likely be required to charge foreign mailers rates comparable to those charged to domestic mailers due to the non-discrimination requirements of PAEA. See, e.g., 39 U.S.C. § 403(c). This would result in large rate increases on Inbound Letter Post, which would make the Postal Service’s compliance with the market-dominant rate cap more difficult—by using up “cap space” on these large rate

²⁰ U.S. Chamber of Commerce Motion to Unseal Library Reference and Motion to Request Issuance of Information Request, Dkt. No. R2018-1 (Oct. 13, 2017).

²¹ LETTER FROM VARIOUS MEMBERS OF CONGRESS TO POSTMASTER GENERAL BRENNAN AND SECRETARY OF STATE TILLERSON (NOV. 8, 2017), *available at* <https://tinyurl.com/ybz66tfs> (last visited March 30, 2018).

²² Order on Price Adjustments for First-Class Mail, USPS Marketing Mail, Periodicals, Package Services, and Special Services Products and Related Mail Classification Changes, Dkt. No. R2018-1 (Nov. 9, 2017) (“Order No. 4215”), at 18 (“any interested person who believes that the Postal Service is not operating in conformance with section 403(c) may lodge a complaint with the Commission in such form or manner that the Commission prescribes”).

increases for Inbound Letter Post, the Postal Service would be limited in its ability to increase domestic First-Class Mail rates. It makes no sense to allow the Postal Service to utilize all available rate cap authority on domestic mailers only—PAEA intended for all mailers, both domestic and international to be protected by the cap.

III. THE COMMISSION COULD ALTERNATIVELY RECLASSIFY INBOUND LETTER POST AS A COMPETITIVE PRODUCT

Rather than exclude Inbound Letter Post from the rate cap, which would place it in its own nebulous third category of products, the Commission could alternatively reclassify Inbound Letter Post as a competitive product. This reclassification would comply with the Commission’s prior holding that PAEA “requires international mail to be classified as either market-dominant or competitive.”²³

Reclassification of Inbound Letter Post as competitive would comport with market realities, as parcels within the scope of Inbound Letter Post are contestable by private sector companies, including UPS. The Postal Service has admitted this is the case.²⁴ The Commission has also recognized generally that “[t]he parcels market is by all accounts competitive.”²⁵

Such reclassification would mean the PAEA provisions generally applicable to competitive products would also apply to Inbound Letter Post. These include prohibitions on cross subsidization and the requirement that each competitive product cover its attributable costs. See 39 U.S.C. § 3633(a)(1)-(2).

²³ Order No. 43 at 79.

²⁴ Order No. 4451 at 23-24 (describing how the Postal Service “repeatedly claims that, notwithstanding its classification as a market-dominant product, the Inbound Letter Post product, specifically small packets, is subject to considerable competition”).

²⁵ Order No. 43 at 86.

This reclassification would also mean that the Secretary of State's power to take diplomatic actions in regard to international postal rates would be limited. This power is subject to the limitation that state actions must not "grant an undue or unreasonable preference to the Postal Service" as those actions pertain to ***"any competitive product."*** 39 U.S.C. § 407(b)(1) (emphasis added). As such, the United States would be barred from agreeing to UPU Conventions that give preferential treatment to the Postal Service under the terminal dues system.

CONCLUSION

UPS respectfully requests that the Commission reject the Postal Service's proposal to exclude Inbound Letter Post from the Rate Cap.

Respectfully submitted,

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